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No.

ALEXANDER L. STEVAS,
CLERK

**IN THE
SUPREME COURT
OF THE UNITED STATES**

October Term, 1983

NEIL J. DROUILLARD,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

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QUESTIONS PRESENTED

1. Whether Mr. Drouillard was denied his constitutional right of full cross examination of the chief prosecution witness as to credibility and bias?

2. Whether the court denied Mr. Drouillard due process by failing to instruct the jury on the credibility of the chief government witness, who was an admitted perjurer, accomplice, informer and was testifying pursuant to a Rule 11 Agreement?

3. Whether the court denied a fair trial by deciding that co-conspirator statements were admissible based on the informant's direct testimony prior to full cross examination?

4. Whether Mr. Drouillard was denied a fair trial by the prosecutor's improper implicit and explicit vouching for the credibility of the witnesses?

5. Whether the court's instruction on the credibility of Mr. Drouillard was unconstitutional, because it set a different standard requiring a preliminary determination of reliability; said error was exacerbated by the absence of any cautionary instruction concerning the testimony of an accomplice, who had admitted committing perjury?

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Petitioner, Neil J. Drouillard, respectfully requests that a Writ of Certiorari issue to review the Judgment and Order of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Order of the Sixth Circuit Court of Appeals is not reported and is attached as exhibit A. No opinion was rendered by the District Court for the Eastern District of Michigan.

JURISDICTION

The Judgment of the United States Court of Appeals for the Sixth Circuit was entered on May 25, 1983. This Petition for Certiorari is within sixty days of that date.

The Jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty or property, without due process of law; . . ."

The Sixth Amendment to the United States Constitution provides in pertinent part:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ; to be confronted with the witnesses against him; . . ."

STATEMENT OF THE CASE

Neil R. Drouillard was charged with conspiracy to have checks, which were issued as commercial bribes, taken to Canada to be cashed in violation of 18 U.S.C. §§371, 1952, 1101, 1059 and 2314. In addition, Mr. Drouillard, along with Patrick Conlon, was charged with specific illegal acts related to the conspiracy charge: causing checks to be taken across the Canadian border and causing checks to be taken across the Canadian border without reporting to the Department of Treasury as required by law.

The evidence presented at trial centered on several transactions involving Patrick Conlon. During the periods relevant to this case Conlon was employed by Fischbach-Natkin, a construction contractor. His primary responsibility at Fishbach-Natkin was industrial and labor relations. One of his supervisors at the corporation was Mr. Drouillard.

This case was tried from June 30, 1981 to July 8, 1981 before Judge Robert E. DeMascio of the Eastern District of Michigan.

In the middle of the first day of trial, Conlon decided to plead guilty to several of the charges against him. In the process of offering his plea, Conlon indicated to the court that Mr. Drouillard had not taken part in a conspiracy.

The government called William Pettibone, the Chairman of Commercial Contracting Corporation, who testified under a grant of immunity. Pettibone testified concerning statements made by the former president of Commercial Contracting Corporation, Cass Duke. Defense counsel interposed a hearsay objection which was overruled when the prosecutor represented to the court that Duke was a member of the conspiracy.

The government next called two officers in Brenca Contractors, Inc. who testified with respect to the payments made to Conlon. Neither, however, related any involvement of Mr. Drouillard.

Following this, the Court allowed Conlon to plead guilty. During the plea he again stated in response to questioning by the Court that Mr. Drouillard was not involved in these crimes. The Court accepted the plea.

Raymond Vecellio, the owner of Vecellio Electric, testified that Conlon proposed to have checks run through Vecellio's company. Vecellio discussed this proposal with his accountant, Boyer, who agreed that it could be done.

A meeting was therefore held at which Conlon, Boyer and Vecellio discussed the transportation of the checks to Canada. Mr. Drouillard was not at this meeting. Vecellio was asked about a statement made by Conlon at this meeting. Defense counsel objected to such testimony, but this objection was overruled.

The prosecutor concluded his direct examination of Vecellio by ascertaining that he had entered into a plea agreement with the government. The prosecutor then asked if part of Vecellio's plea agreement included the requirement that he testify truthfully. Defense counsel's objection

to this question was overruled and Vecellio was allowed to respond that his plea agreement included a requirement that he testify truthfully.

On cross examination, Vecellio stated that he never told Mr. Drouillard of the payments to Conlon and never discussed taking money to Canada with Mr. Drouillard.

Frank Vallecorsa testified as to Conlon's plan to obtain money through Vallecorsa's company, American International Contracting. During the course of his testimony, Vallecorsa related several statements made by Conlon. These statements were admitted over defense counsel's hearsay objections.

The prosecutor concluded his examination of Vallecorsa by eliciting the terms of the grant of immunity which he received. Included in the granting of immunity was a requirement that he testify truthfully.

The prosecution then called Wayne Boyer, the key prosecution witness, who first suggested to Vecellio and Conlon that checks could be laundered through Canada.

Boyer testified in exchange for a plea agreement which allowed him to plead guilty to a five year felony. This plea agreement included a promise by the government not to prosecute any matters known to the government arising from the investigation into these activities.

Originally, the prosecutor had offered to allow Boyer to plead guilty to a misdemeanor. However, this offer was withdrawn by the government when Boyer admitted to committing perjury in his testimony before the grand jury after this agreement had been reached.

Boyer stated that he talked to both Conlon and Mr. Drouillard at a lunch meeting about laundering checks. In addition, Boyer claimed that he received a phone call from Mr. Drouillard, during which Mr. Drouillard inquired about one of the checks which Boyer had transferred to Canada.

According to Boyer, he later called Mr. Drouillard to tell him that the cash had been returned from Canada and that Drouillard could pick this money up at Boyer's office. However, neither Boyer nor any other witness testified that Mr. Drouillard picked up the money.

Counsel for Defendant began his cross-examination of Boyer shortly before the noon recess in the second day of trial. Prior to the recess, counsel cross examined only as to Boyer's background and the circumstances of his arrest. At this point the Court adjourned for lunch.

Following the recess, but before counsel for Mr. Drouillard resumed his cross examination, the Court stated that it entertained great doubt whether Mr. Drouillard was a member of a conspiracy with Conlon. The Court, however, held that based on Boyer's testimony it could find that Mr. Drouillard was part of a conspiracy.

During the course of the extensive cross examination which followed, counsel for Mr. Drouillard asked Boyer if he received immunity from prosecution for any crimes which arose out of the government's investigation of these charges. The prosecutor objected to the use of the term immunity, pointing out that Boyer was testifying pursuant to a plea agreement, not a grant of immunity. The Court agreed with the prosecutor's objection:

"Well, the difference is, Mr. Finn, quite significant. The testimony was, as I understand it, he's doing this under a plea agreement, not under a grant of immunity, which comes from the Court.

* * *

But you used the word immunity. Your question would be proper if you asked whether it was part of the plea agreement that he would not be prosecuted for anything in connection with the cocaine that was found on him."

Boyer was asked during cross examination if he had been sentenced on his plea of guilty. He responded that he had not yet been sentenced because he was "a government witness and there are other trials going on."

Defense counsel made an offer of proof outside of the presence of the jury on matters he wanted to use to impeach the credibility of Boyer. Counsel sought to question Boyer with respect to an incident in which Boyer gave an IRS agent a four ounce bag of marijuana, as well as an incident in which Boyer took an IRS agent to a house of prostitution. The prosecutor objected to the introduction of this testimony on the grounds that this testimony had nothing to do with the commission of a crime.

The Court held that this evidence would be admitted if it went to the truth or veracity of the witness or if it was a crime covered by the plea agreement which Boyer had previously entered into with the government.

In front of the jury, counsel for Defendant asked Boyer about the nature of his plea agreement:

Q. (By Mr. Finn) Was it your understanding, Mr. Boyer, that the following additional promise has been made by the attorney for the Government is that no further prosecution on any matters known to the Government arising from the instant investigation will be made; is that your understanding?

A. That's my understanding, yes, sir."

Counsel proceeded to ask Boyer whether he had told a federal agent that he had given an IRS agent a four ounce bag of marijuana. This question was objected to by the prosecutor and the objection was sustained.

Counsel then asked several additional questions on the Rule 11 agreement entered into by Boyer:

"Did the Government say that they were not going to prosecute you, Mr. Boyer, because of any actions you

took with any IRS agents who were auditing clients of yours?"

Q. (By Mr. Finn) Can you answer that question?

A. I would like you to qualify if that's possible, present, past—

Q. (Interposing) See if you can answer that question, first. Can you answer that question yes or no?

A. No, I can't.

Q. All right. How can you answer it?

A. I can qualify it in this way, that my understanding is that anything that had transpired, any information that was given to the Government prior to my arrest would not be used against me.

Q. Any investigation—any information you gave to the Government prior to your arrest?

A. This transaction that I was involved in prior to my arrest.

Q. Including giving any gift or things, or doing any favors for any IRS agents who are auditing clients of yours?

A. Any information that I gave to the Government regarding anything would not be used against me.

Counsel for Mr. Drouillard then attempted to ask Boyer about an incident in which he took an IRS auditor who had audited Boyer's clients to a house of prostitution. The prosecutor objected to this question; the trial court sustained this objection.

On redirect examination, the prosecutor completed his questioning of Boyer by asking the following:

Q. (By Mr. March) Mr. Boyer, when you testified in the Grand Jury on March 18, 1980, you lied; is that correct?

A. Yes, sir.

Q. And you had a plea agreement with the United States; is that correct?

A. That is also correct, sir.

Q. The terms of that plea agreement being the maximum sentence was one year?

A. Yes, sir.

Q. And did you lie in that Grand Jury?

A. Yes.

Q. What happened to you, sir?

A. The plea agreement was taken away from me, sir.

Q. Did you come to the United States and tell us you lied?

A. Yes, I did, sir.

Q. And the plea agreement was taken away?

A. Yes, sir.

Q. Was there a second plea agreement entered?

A. Yes.

Q. And would you face five years imprisonment?

A. Yes, sir.

Q. Would you lie again?

Counsel for Mr. Drouillard objected to this question. The prosecutor then asked, "Are you lying now?" Boyer responded, "No, sir."

Following Boyer, Robert Davis testified. Davis was the man who took the checks from Boyer and cashed them in Canada. The prosecutor ended his direct examination of

Davis by eliciting that Davis was testifying under immunity and that one of the terms of that immunity required him to testify truthfully. On cross examination Davis acknowledged that he had never met Mr. Drouillard.

The prosecution then showed that none of the persons involved in the conspiracy filed a customs report for the transportation of money. The government then rested.

Defense counsel moved for a judgment of acquittal on the conspiracy charge and those charges under 18 USC §2314. These motions were denied.

In defense counsel's opening statement he emphasized the crucial question of the credibility of Boyer.

The first witness called by the defense, Raymond Vecellio, testified that he never discussed the checks or Canada with Mr. Drouillard.

Patrick Conlon then testified that he did not want anyone at Fischbach-Natkin to know that he was getting money from Commercial Contracting Company and that Mr. Drouillard knew nothing about Conlon obtaining money from either Commercial Contracting or Brenca, nor did he receive any of the money paid to Conlon.

Conlon further stated that he met with Boyer, Vecellio and Mr. Drouillard in 1978, but nothing was said in Mr. Drouillard's presence concerning Canada.

With respect to the transactions involving Conlon and American International Contracting, Conlon stated that he had to argue with Mr. Drouillard to convince him to authorize payment to settle the claim. Mr. Drouillard did not receive any of the money involved in the American International Contracting transaction either.

Mr. Drouillard testified that he was not involved in the conspiracy alleged. He admitted that he had had lunch with Boyer, Conlon and Vecellio in August or September 1978,

but that there had been no discussion at this meeting regarding the cashing of checks in Canada. However, Mr. Drouillard did not learn of Conlon's activities with the various contractors until February or March 1980 when Conlon told him about these transactions.

After Mr. Drouillard's testimony, the defense rested. The prosecution presented one rebuttal witness, after which it rested.

In his rebuttal argument to the jury, the prosecutor argued the credibility of Boyer and Vecellio by making reference to their plea agreements:

Wayne Boyer lied in that Grand Jury under oath. You heard his testimony, ladies and gentlemen. He came back to the United States. He said he lied to you. I've got a plea agreement with you for one year, maximum of one year imprisonment, and I lied to you.

* * *

We said okay, Mr. Boyer. You lied. You want to lie before the Grand Jury? Now you've got five years. That's a deal?

I asked Mr. Boyer, did you lie again? He said, no way. He lost the deal for one year and got five years.

Mr. Vecellio faces five years and Mr. Finn told you they have the sword of Damocles held over the necks and if they don't testify the way the United States wants them to testify, it's going to fall. That's not true, ladies and gentlemen. The testified on the stand what their agreement was. They said the truth and let the chips fall where they may. If they don't tell the truth, that's when the sword of Damocles will fall on them.

In its instructions, the Court told the jury that it consider carefully the testimony of a witness granted immunity. There was no cautionary instruction concerning the testimony of a witness who testified pursuant to a plea agree-

ment or who had committed perjury, or who was an accomplice.

The trial court instructed the jury to view the testimony of Mr. Drouillard carefully and charged them that his testimony, "if rational, natural and consistent, it may outweigh the testimony of other witnesses."

The jury did not reach a verdict on the first day of deliberations. The jury returned a verdict of guilty on all counts.

Mr. Drouillard was sentenced to three years on all counts to run concurrently.

REASONS FOR GRANTING THE WRIT

I. The decision below conflicts with decision of this court.

The affirmance of the trial court's ruling that Mr. Drouillard could not ask the chief government witness questions concerning two incidents regarding different IRS agents denied him his right of cross examination. *Davis v Alaska*, 415 US 308, 94 S Ct 763, 39 L Ed2d 347 (1974).

On one occasion, the chief witness informed the FBI he had taken an IRS agent to a house of prostitution after the agent had completed an audit of his client. On another occasion, he had given an IRS agent four ounces of marijuana. The trial court noted that there was 99 and 9/10 chance that the same agent would do a subsequent audit. The evidence was relevant to show the extent of the Rule 11 agreement and the credibility of the witness. However, the trial court refused to allow it to be presented to the jury.

The scope of cross examination of government witnesses is a recurring problem in criminal cases based on accomplice testimony. The Court of Appeals ruled that the proffered evidence was cumulative to the evidence of the

existence of a Rule 11 agreement, the admitted perjury of the witness and the witness's current involvement in the crime charged. However, the evidence proffered, bribery of a federal official, is qualitatively different than the other illegal conduct brought to the attention of the jury. It is relevant to both credibility and bias.

The holding of the Court of Appeals is tantamount to finding harmless error for a violation of the Constitutional right of confrontation. Even if there could be harmless error for the violation of the right to confrontation, this is not an appropriate case for such a finding as the only factual issue presented at trial was the credibility of the government witness as against the credibility of Petitioner. Therefore, a limitation on the full right of confrontation of this witness denied Mr. Drouillard of a Fair Trial.

The failure of the trial court to instruct the jury on the caution the jury should use before relying on the testimony of an accomplice and informer exacerbated the erroneous limitation placed on cross examination. *On Lee v United States*, 343 US 747, 72 US 967, 96 L Ed 1270 (1910).

The trial court's premature conclusion that there was sufficient evidence of a conspiracy was also error denying full right of confrontation. The trial court, after only partial cross examination of the chief government witness, concluded there was a conspiracy shown. However, this conclusion was based only on the direct examination of the witness and a beginning cross examination. The full cross examination of the informer occurred after the court had concluded there was a conspiracy. The timing of the finding of a conspiracy is an important point which should be addressed by this Court.

In addition, this case presented the opportunity for this Court to address the practice of the prosecutor, both implicitly and explicitly, vouching for the credibility of the government witnesses.

Finally, the trial court's instruction to the jury on the credibility of Mr. Drouillard set a different standard requiring a preliminary determination of reliability, which was not required for the determination of credibility of the other witnesses. *Cool v United States*, 409 US 100; 935 S Ct 354; 34 L Ed2d 335 (1972). This double standard especially when combined with the absence of any instruction on the accomplice-informer-admitted-perjurer-Rule 11 government witness, deprived Mr. Drouillard of a Fair Trial.

These errors, either individually or collectively, should be reviewed by this Court to provide guidance in future cases and Due Process in this case. Therefore, certiorari should be granted.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,
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Dated:

EXHIBIT A

NO. 82-1293

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

NEIL J. DROUILLARD,
Defendant-Appellant

ORDER

(Filed: May 25, 1983)

BEFORE: KEITH and KRUPANSKY, Circuit Judges; and
HORTON, District Judge*

Defendant Neil J. Drouillard (Drouillard) appeals from his conviction by a jury in the Eastern District of Michigan of several criminal offenses related to an international bribery scheme.

Drouillard's primary argument on appeal is that the trial court improperly curtailed cross-examination of a key prosecution witness, Wayne Boyer (Boyer). On direct examination, it was established that Boyer had entered a plea agreement with the Government whereby, in exchange for his cooperation, Boyer would be permitted to plead to one felony count of violating Custom requirements. It was also part of this agreement that any information or evidence obtained by the Government in connection with Boyer's arrest would not be utilized to prosecute him. This latter agreement included the Government's promise not to prosecute for possession of cocaine found on Boyer's person when he was arrested.

* Hon. Odell Horton, United States District Judge for the Western District of Tennessee, sitting by designation.

It was also established that Boyer had previously entered a plea agreement with the Government in connection with this same series of events which would have permitted Boyer to plead to a misdemeanor. This agreement was dissolved when Boyer informed the Government that he had lied in his grand jury testimony.

The defense attempted to question Boyer about two incidents regarding an IRS agent. In the course of the investigation in this case, Boyer informed an FBI agent that on one occasion Boyer had given an IRS agent a four ounce bag of marijuana and on another occasion taken an IRS agent to a house of prostitution. The trial court would not permit inquiry into these actions.

On appeal, defendant asserts that the trial court impermissibly restricted the scope of his cross-examination. Defendant contends that he should have been entitled to inquire into these areas under Rule 608(b), Fed. R. Evid. and the Confrontation Clause of the Sixth Amendment.

Rule 608(b) provides:

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

Under this Rule, the district court has broad discretion to limit the scope of cross-examination. See e.g. *United States v. Taylor*, 657 F.2d 92 (6th Cir.) (per curiam) cert. denied, 454 U.S. 1086 (1981); *United States v. Vinson*, 606 F.2d 149 (6th Cir. 1979), cert. denied, 444 U.S. 1074 (1980).

In the instant case, where the jury was apprised of Boyer's plea agreement, aware of his substantial involvement in the criminal case in issue, and aware of his past perjury, it was not an abuse of discretion to foreclose inquiry into this cumulative evidence.

A trial court's discretion with respect to cross-examination of a prosecution witness is limited by the right of confrontation guaranteed by the Sixth Amendment. *See United States v. Garrett*, 542 F.2d 23 (6th Cir. 1976). Nevertheless, as indicated, matters regarding Boyer's plea agreement and other unlawful activity were fully developed before the jury thus providing the jury with "sufficient information to make a discriminatory appraisal of the witness's bias or motive." *United States v. Hinton*, 683 F.2d 195, 200 (7th Cir.), *cert. granted*, U.S. , 103 S. Ct. 567 (1982). Accordingly, it was not an abuse of discretion for the trial court to preclude cross-examination regarding these incidents.

The Court has reviewed the remaining arguments advanced by the defendant and finds that they are also without merit. Therefor, the judgment of the court must be, and hereby is, **AFFIRMED**.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman
Clerk